TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES	i
PRAYER	1
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE NATURE OF THE CASE	8
REASONS FOR DENYING THE WRIT	9
ARGUMENTS AND AUTHORITIES	10
CONCLUSION	13
CERTIFICATE OF SERVICE	14

INDEX OF AUTHORITIES

CASES

	Page
Bailey v. Patterson, 369 U.S. 31, 82 S.Ct. 549, 33 L.Ed.2d 512 (1962)	10
Dunn v. Blumstein, 405 U.S. 330 (1972)	12
Goosby v. Osser, 93 S.Ct. 854 (1973)	9, 10, 13
Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 30 S.Ct. 326, 54 L.Ed. 482 (1910)	10, 11
Levering and Garrigues v. Morris, 289 U.S. 103, 53 S.Ct. 549, 77 L.Ed. 1062 (1933)	11
McGilvra v. Ross, 215 U.S. 70, 30 S.Ct. 27, 54 L.Ed. 95 (1909)	11
Phillips v. United States, 312 U.S. 246, 61 S.Ct. 480, 85 L. Ed. 800 (1941)	13
Ex Parte Poresky, 290 U.S. 30, 30 S.Ct. 27, 78 L.Ed. 152 (1933)	10, 11
Turner v. Fouche, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970)	13
Schwegmann Bros. Giant S. Mkts. v. Louisiana Milk Com'n, 365 F.Supp. 1144 (1973)	13
Shapiro v. Thompson, 394 U.S. 618 (1969)	12
Starns v. Malkerson, 326 F.Supp. 234 (D. Minn. 1970), aff'd without opinion, 401 U.S. 985 (1971)	9, 10, 11, 12
Vlandis v. Kline, 93 S.C. 2230 (1973)	12
Weaver v. Kelton, 357 F.Supp. 1106 (1973)	10, 11, 12

IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-1443

UNIVERSITY OF HOUSTON,
LAMAR UNIVERSITY, ET AL., *Petitioners*

v.

MARVIN WURZER, ET AL., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

To The Honorable Supreme Court Of The United States:

The Respondents, MARVIN WURZER, ET AL., pray that a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit be denied.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit reversing and remanding the Judgment and Order of the District Court for the Southern District of Texas, a Petition for rehearing was denied by the Court of

Appeals on December 28, 1973. The order of the District Court for the Southern District of Texas was reversed and remanded.

JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition.

QUESTIONS PRESENTED

I.

For the purposes of satisfying 28 U.S.C. §2281, does a substantial question remain concerning the constitutionality of certain Texas statutes which prescribe different college fee schedules for residents and nonresidents, and which establishes a one-year presumption of nonresidency for recent transferees into the State of Texas.

II.

Pursuant to 28 U.S.C. §2281, can a three-judge panel be properly convened to hear complaints of a misapplication of a Texas statute resulting in a violation of Plaintiff-Respondents' constitutional rights.

STATUTE INVOLVED

The challenged sections of the Texas Education Code, Sections 54.051 through 54.056 are reprinted here for consideration as follows:

Section 54.051. Tuition Rates

"(a) The governing board of each institution of higher education shall cause to be collected from

students registering at the institution tuition or registration fees at the rates prescribed in this section.

"(b) Tuition for resident students, except as otherwise hereinafter provided, is $4 per semester credit hour, but the total of such charge shall not be less than $50 per semester.

"(c) Tuition for nonresident students, except as otherwise hereinafter provided, is $40 per semester credit hour.

"(d) Resident or nonresident students registered for thesis or dissertation credit only, in those instances where such credit is the final credit hour requirement for the degree in progress, shall pay a sum proportionately less than herein prescribed but not more than $50.

"(e) Tuition for resident students registered in a medical or dental branch, school or college is $400 per academic year of 12 months.

"(f) Tuition for nonresident students registered in a medical or dental branch, school or college is $1,200 per academic year of 12 months.

"(g) Resident or nonresident students registered for a course or courses in art, architecture, drama, speech, or music, where individual coaching or instruction is the usual method of instruction, shall pay a fee in addition to the regular tuition, said fee to be designated by the governing board of such institution; but in no event shall such fees be more per course per semester of four and one-half months or per summer session than $75.

"(h) Tuition for students who are citizens of any country other than the United States of America is $14 per semester credit hour, but the total of such charge shall be not less than $200.

"(i) Tuition for students who are citizens of any country other than the United States of America registered in a medical or dental branch, school or college is $800 per academic year of 12 months.

"(j) Tuition for nonresident students registered in a public junior college is as provided in Subsection (b), Section 130.003 of the Texas Education Code.

"(k) Tuition for students registered in a school of nursing as a nursing student is $50 per semester and per 12-week summer session.

"(l) Tuition for students registered in a school of nursing as a nursing student for less than 12 semester credit hours of work or for less than a full semester credit hour or term hour load during a summer session shall pay an amount proportionately less than the amount provided in Subsection (k) of this section, but not less than $20.

"(m) Twenty-five cents out of each hourly charge in Subsection (b) and $1.50 out of each hourly charge in Subsection (c) of this section shall be placed in scholarship fund at each institution to be administered by that institution to award scholarships to needy students. Standards for determining need shall be formulated by each institution. No more than 10 percent of said scholarship funds may be allocated to out-of-state students.

"(n) Notwithstanding the preceding provisions of this section, any nonresident student who is enrolled for the spring semester of 1971 in an institution covered by this section may continue to enroll at the same institution at the same tuition rate that was effective at the time of his original enrollment until one of the following conditions first occurs:

(1) he receives the degree at the degree level (i.e., the baccalaureate, master's, or doctoral degree) toward which he is working during the spring semester of 1971; or

(2) he voluntarily withdraws from the institution or the institution involuntarily withdraws the student for disciplinary reasons or for failing to meet the academic standards of the institution; or

(3) the termination of the spring semester of 1975.

"(o) A teaching assistant, research assistant, or other student employee of any institution covered by this section is entitled to register himself, his spouse, and their children in a state institution of higher education by paying the tuition fees and other fees or charges required for Texas residents, without regard to the length of time he has resided in Texas; provided that said student employee is employed at least one-half time in a position which relates to his degree program under rules and regulations established by the employer institution. This exemption shall continue for students employed two consecutive semesters through the summer session following such employment if the institution is unable to provide employment and, as determined under standards established by the institution, if the employee has satisfactorily completed his employment.

"(p) A nonresident student holding a competitive scholarship of at least $200 for the academic year or summer for which he is enrolled is entitled to pay the fees and charges required of Texas residents without regard to the length of time he has resided in Texas, provided that he must compete with other students, including

Texas residents, for the scholarship and that the scholarship must be awarded by a scholarship committee officially recognized by the administration of the institution of higher education."

Amended by Acts 1971, 62nd Leg., p. 3352, ch. 1024, art. 2, §29, eff. Sept. 1, 1971.

Section 54.052. Residents; Nonresidents; General Rules

"(a) The term 'residence,' as used in this subchapter, means 'domicile.' The term 'resided in' means 'domiciled in.' For the purposes of this subchapter, the status of a student as a resident or nonresident student is determined as prescribed by this section, subject to the other applicable provisions of this subchapter.

"(b) An individual under 21 years of age who is living away from his family and whose family resides in another state or has not resided in Texas for the 12-month period immediately preceding the date of registration shall be classified as a nonresident student.

"(c) An individual 21 years of age or under whose family has not resided in Texas for the 12-month period immediately preceding the date of registration shall be classified as a nonresident student, regardless of whether he has become the legal ward of residents of Texas or has been adopted by residents of Texas while he is attending an educational institution in Texas, or within a 12-month period before his attendance, or under circumstances indicating that the guardianship or adoption was for the purpose of obtaining status as a resident student.

"(d) An individual 21 years of age or over who has come from outside Texas and who is gainfully

employed in Texas for a 12-month period immediately preceding registration in an educational institution shall be classified as a resident student as long as he continues to maintain a legal residence in Texas.

"(e) An individual 21 years of age or over who resides out of the state or who has come from outside Texas and who registers in an educational institution before having resided in Texas for a 12-month period shall be classified as a nonresident student."

Section 54.053. Regulations of Coordinating Board.

"The governing board of each institution required by this chapter to charge a nonresident tuition or registration fee is subject to the rules, regulations, and interpretations issued by the Coordinating Board, Texas College and University System, for the administration of the nonresident tuition provisions of this subchapter. The rules, regulations, and interpretations promulgated by the coordinating board shall be furnished to the presidents or administrative heads of all Texas public senior or junior colleges and universities."

Section 54.054. Nonresident Status; Presumption; Reclassification.

"A nonresident student classification is presumed to be correct as long as the residence of the individual in the state is primarily for the purpose of attending an educational institution. After residing in Texas for at least 12 months, a nonresident student may be reclassified by the Coordinating Board, Texas College and University System. Any individual reclassified as a resident student is entitled to pay the tuition fee for a resident of Texas at any subsequent registration as long as he continues to maintain his legal residence in Texas. Before February 15, 1972,

the Coordinating Board, Texas College and University System, shall promulgate such rules and regulations."

Amended by Acts 1971, 62nd Leg., p. 3353, ch. 1024, art. 2, §29, eff. Sept. 1, 1971.

Section 54.055. Parents, Change of Residence to Another State.

"An individual 21 years of age or under whose parents were formerly residents of Texas is entitled to pay the resident tuition fee following the parents' change of legal residence to another state, as long as the individual remains continuously enrolled in a regular session in a state-supported institution of higher education."

Amended by Acts 1971, 62nd Leg., p. 3354, ch. 1024, art. 2, §29, eff. Sept. 1, 1971.

Section 54.056. Effect of Marriage.

"A nonresident who marries and remains married to a resident of Texas, classified as such under this chapter at the time of the marriage and at the time the nonresident registers, is entitled to pay the resident tuition fee regardless of the length of time he has lived in Texas; and any student who is a resident of Texas and who marries a nonresident is entitled to pay the resident tuition fee as long as he does not adopt the legal residence of the spouse in another state."

STATEMENT OF THE NATURE OF THE CASE

This litigation involves a complaint brought by student Plaintiffs attending the University of Houston and Lamar University against these institutions of higher learning which are official agencies of the State of Texas. The complaint prays "that a declaratory judgment shall issue

declaring Sections 54.051 through 54.056 of the Education Code of the State of Texas, are void as violating the Constitution of the United States insofar as the same are written and applied to Plaintiffs and to the classes which they represent."

The complaint further prays that "in the event the statute should be declared constitutional and valid—that the Court declare the statute unconstitutional as applied to each Plaintiff . . ."

The Defendant-Petitioners filed a Motion to Dismiss on the grounds that no substantial federal question was presented by the complaint and this motion was granted by the District Court.

The Court of Appeals for the Fifth Circuit reversed and remanded the case for the empaneling of a three-judge court.

REASONS FOR DENYING THE WRIT

1. The issues presented by Petitioner in the case at bar are not questions which may be properly brought before this Court. Rule 19 of the Rules of the Supreme Court of the United States clearly outlines the nature of questions on which this Court will grant a Writ of Certiorari and no amount of straining on the part of the Petitioners will bring their issues within the commands of Rule 19. These are clearly no "special and important reasons" for this Court to grant certiorari now requested by Petitioners.

2. The substantial question requirement of 28 U.S.C. § 2281 as most recently enunciated by this Court in *Goosby v. Osser,* 93 S.Ct. 854 (1973) clearly indicates that *Starnes v. Malkerson,* 326 F. Supp. 234 (D. Minn. 1970), aff'd without opinion, 401 U.S. 985 (1971), and

Weaver v. Kelton, 357 F. Supp. 1106 (1973), are not prior decisions which would foreclose the subject of Respondents' constitutional attack upon certain Texas statutes.

3. Pursuant to 28 U.S.C. § 2281, a three-judge court shall be convened to hear complaints of unconstitutional state statutes as well as the unconstitutional misapplication of valid state statutes.

ARGUMENTS AND AUTHORITIES

Petitioners contend that Respondents' constitutional attack on certain statutes of the State of Texas is foreclosed by the previous opinions in *Starnes* and *Weaver.* Such a contention is completely without merit. Respondents would respectfully point to *Goosby v. Osser,* 93 S.Ct. 854 (1973):

> "Section 28 USC §2281 (28 USCS §2281) does not require the convening of a three-judge court when the constitutional attack upon the state statutes is insubstantial. 'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' *Bailey v. Patterson,* 369 U.S. 31, 33 L.Ed.2d, 82 S.Ct. 549 (1962), 'wholly insubstantial,' ibid., 'obviously frivolous,' *Hannis Distilling Co. v. Baltimore,* 216 U.S. 285, 288, 54 L.Ed. 482, 30 S.Ct. 326 (1910), 'obviously without merit,' *Ex parte Poresky,* 290 U.S. 30, 32, 78 L.Ed. 152, 54 S.Ct. 3 (1933). The limiting words 'wholly' and 'obviously' have congent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions which merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of

> 28 USC §2281 (28 USCS §2281). A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' *Ex parte Poresky*, supra, 290 U.S., at 32, 78 L.Ed. 152; see also *Levering and Garrigues Co. v. Morrin*, supra, 289 U.S. 103, 105, 77 L.Ed. 1062, 53 S.Ct. 549 (1933); *Hannis Distilling Co. v. Baltimore*, supra, 216 U.S., at 288, 54 L.Ed. 482; *McGilvra v. Ross*, 215 U.S. 70, 80, 54 L.Ed. 95, 30 S.Ct. 27 (1909). Id. at 858-59.

Employing this test of substantiality, it is clear that the subject of Respondents' constitutional attack upon the Texas statute in question is not foreclosed by the prior decision of this Court in *Starnes*. Further, Respondent would show that even Petitioner concedes that the fact situation in the case at bar is different from that found in Starnes. Petitioner's Brief for Certiorari at p. 5.

In *Starnes* and *Weaver*, Appellants were married women who moved to the complained of states and attempted to enroll as resident students, after having domiciled themselves in the respective states for less than one year; in the instant case, the complaint alleges that a number of the Plaintiffs have lived in the State more than one year; a number of the Plaintiffs are unmarried females; some Plaintiffs are under 21 years of age; some are receiving support from, or are living with parents; some were born in the State, left, and returned later; some worked full-time before entering the respective school attended; some have paid State taxes for varying periods; all, however, have been denied resident student status for tuition purposes, and each alleges that he/she in his/her

own right, and the class he/she represents, are unconstitutionally discriminated against in the setting of fees both by statute, rule and practice.

Further, Petitioners rely heavily on *Weaver,* but it should be noted that in the Court's opinion in that case the question of convening a three-judge panel to hear Plaintiff's complaint was reached only in dicta. Quite candidly, the Court in *Weaver* began its remarks on 28 U.S.C. §2281 by saying it was "For purposes of discussion." 357 F. Supp. at 1108.

It is apparent, then, that neither *Starnes* nor *Weaver* are authority for the critical factual issues raised by the Respondent.

As additional support for its position, Respondent would direct the Court's attention to *Vlandis v. Kline,* 93 S.Ct. 2230 (1973). Therein, Mr. Justice Marshall, with whom Mr. Justice Brennan joins, concurring, indicates that *Starnes v. Malkerson* is not irrevocably closed to further consideration by the Supreme Court of the United States. Mr. Justice Marshall:

> "I recognize that in *Starnes v. Malkerson,* 401 U.S. 985 (1971), we summarily affirmed a district court decision sustaining a one-year residency requirement for receipt of in-state tuition benefits. But I now have serious question as to the validity of that summary decision in light of well-established principles, under the Equal Protection Clause of the Fourteenth Amendment, which limit the States ability to set residency requirements for the receipt of rights and benefits bestowed on bona fide state residents. See *Dunn v. Blumstein,* 405 U.S. 330 (1972): *Shapiro v. Thompson,* 394 U.S. 618 (1969). Because the Court finds sufficient basis in the Due Process Clause of the Fourteenth Amendment to dis-

> pose of the constitutionality of the Connecticut statute here at issue, it has no occasion to address the serious equal protection questions raised by this and other tuition residency laws. In the absence of full consideration of those equal protection questions, I would leave the validity of a one-year residence requirement for a future case in which the issue is squarely presented."

Respondents would finally argue that Petitioner's contention that a three-judge panel cannot be properly convened to hear complaints of alleged misapplication of state statutes is equally without merit. Petitioner would propose a distinction between attacks on statutes and attacks upon the results of their administration. Such a distinction cannot withstand the inquiry of this Court and amounts to a basic misreading of the Courts prior decisions in this area. *Phillips v. United States,* 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 (1941); *Turner v. Fouche,* 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970); *Schwegmann Bros. Giant S. Mkts. v. Louisiana Milk Com'n,* 365 F. Supp. 1144 (1973).

CONCLUSION

Respondent respectfully prays that this Court deny the Writ of Certiorari and would point to *Goosby v. Osser* as conclusive authority for the same.

Respectfully submitted,

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228-8519

CERTIFICATE OF SERVICE

I, SAM WILLIAMSON, a Member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of May, 1974, a true and correct copy of the foregoing Respondent's Brief in Opposition to the United States Supreme Court was served upon SAM L. JONES, P. O. Box 12548, Capitol Station, Austin, Texas 78711, Attorney for Petitioners, by placing same in the United States mail with sufficient postage attached.

SAM WILLIAMSON